Supreme Court, U.S.
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No. 95-442

In The

Supreme Court of the United States

October Term, 1995

U.S. HEALTHCARE, INC.,

Petitioner,

v.

CECILIA DUKES, Trustee Ad Litem of the Estate of Darryl Dukes, Deceased,

Respondent.

U.S. HEALTHCARE, a/k/a THE HEALTH MAINTENANCE ORGANIZATION OF PENNSYLVANIA/NJ,

Petitioner,

v.

SERENA MARY VISCONTI, Deceased, by LINDA and RONALD VISCONTI, as Administrators of the Estate of SERENA MARY VISCONTI, Deceased and LINDA & RONALD VISCONTI, in their own right,

Respondents.

On Petition For Writ Of Certiorari To United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS, LINDA AND RONALD VISCONTI, ADMINISTRATORS OF THE ESTATE OF SERENA MARY VISCONTI, DECEASED

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QUESTION PRESENTED

Whether this Court should issue a writ of certiorari to review United States Court of Appeals for the Third Circuit's decision that there was no removal jurisdiction based upon an ERISA pre-emption defense to a state court action asserting negligence in the actual rendering of medical care since the plaintiff was not making a claim or seeking any type of relief within the scope of ERISA's civil enforcement provisions.

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COUNTERSTATEMENT OF CASE

A. COUNTERSTATEMENT OF FACTS

Ronald and Linda Visconti ("Viscontis") are the biological parents of Serena Mary Visconti, Deceased, who was stillborn on August 29, 1991. Incident to Mr. Visconti's employment, the Viscontis were participants in Petitioner, U.S. Healthcare's ("USHC") Health Maintenance Organization. The Viscontis have alleged that USHC held itself out as a corporate health care provider employing agents, servants and employees who possess special skill and training for the purpose of rendering health care services to its participating members. The Viscontis further alleged that Peter M. Wisniewski, M.D. was held out and represented to them by USHC to be a competent and qualified participating obstetrician.

Mrs. Visconti first saw Dr. Wisniewski in connection with her pregnancy with the decedent on February 20, 1991. During the third trimester of the pregnancy, Mrs. Visconti developed signs and symptoms of preeclampsia. Tragically, Dr. Wisniewski took no action whatsoever even when Mrs. Visconti's diastolic blood pressure became severely elevated on August 14, 1991. On August 28, 1991, Mrs. Visconti returned for a routine prenatal visit at approximately the 37th week of the pregnancy. At that time no fetal heart beat could be detected. Mrs. Visconti's blood pressure was recorded as 160/100 and Dr. Wisniewski for the first time noted that she suffered from severe edema (a symptom of preeclampsia). Following the office visit, Mrs. Visconti was admitted to Pennsylvania Hospital with signs and symptoms of severe preeclampsia. On the next day, August 29, 1991, Mrs.

Visconti delivered Serena Mary Visconti stillborn, a fully developed baby girl with no gross congenital abnormalities at 37 weeks gestation weighing at or around 5 pounds, 9 ounces.

B. PROCEDURAL HISTORY OF CASE

The Viscontis commenced a medical malpractice action by filing a complaint against USHC in the Court of Common Pleas of Philadelphia County, Pennsylvania. The Viscontis alleged in the Complaint that Serena Mary Visconti was stillborn due to the negligence in rendering obstetrical care to Mrs. Visconti by USHC and its agent Dr. Wisniewski. Dr. Wisniewski was sued in a separate civil action and is not a party to the case brought against USHC. The Viscontis did not assert any contract claims against USHC nor did they allege any claims in connection with the denial of benefits. Their lawsuit is an ordinary medical malpractice case arising from the obstetrical care rendered to Mrs. Visconti during her pregnancy with the decedent.

USHC filed a timely Notice of Removal of this case with the district court for the Eastern District of Pennsylvania asserting that jurisdiction existed based upon its contention that the Viscontis' claims against it were preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et seq.* ("ERISA"). Thereafter, based upon the same grounds, USHC filed a Motion to Dismiss. The Viscontis filed a timely Motion to Remand to the state court contending that removal was improper and ERISA did not pre-empt their medical negligence claims. USHC admitted that the only basis for removal

was federal question jurisdiction under 28 U.S.C. §1441(b).

On June 9, 1994, the district court denied the Viscontis' Motion to Remand and granted USHC's Motion to Dismiss. The district court held that the case was properly removed to federal court and the Viscontis' negligence claims were pre-empted by §514(a) of ERISA (29 U.S.C. §1144(a)). *Visconti by Visconti v. U.S. Healthcare, Inc.*, 857 F. Supp. 1097 (E.D. Pa. 1994), *rev'd, Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350 (3d Cir. 1995).

A timely appeal of the district court's decision was filed with the Court of Appeals for the Third Circuit. Thereafter, the Viscontis' appeal was consolidated with the appeal taken by the plaintiff in *Dukes v. U.S. Healthcare, Inc.*, 848 F. Supp. 39 (E.D. Pa. 1994), *rev'd*, 57 F.3d 370 (3d Cir. 1995).

In reversing the decisions of the district court, the Third Circuit applied the legal analysis this court adopted in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987) to decide whether removal to district court was proper on the basis of an ERISA pre-emption defense being asserted by the defendant: "The *Metropolitan Life* complete-pre-emption exception, on the other hand is concerned with a more limited set of state laws, those which fall within the scope of ERISA's civil enforcement provision, §502 [29 U.S.C. §1132]. State law claims which fall outside of the scope of §502, even if pre-empted by §514(a), are still governed by the well-pleaded compliant rule and, therefore, are not removable under the complete-pre-emption principles established in *Metropolitan Life*". (App. 13a). Relying in part on *Lupo v. Human Affairs*

International, Inc., 28 F.3d 269 (2d Cir. 1994) and after extensive review of USHC's contention that the plaintiffs' claims were within the scope of §502(a), the Third Circuit held that: "As in *Lupo*, the plaintiffs' claims in these cases do not concern a denial of benefits due or a denial of some other plan created right. Thus, the claims here, like those in *Lupo*, bear no significant resemblance to the claims described in §502(a)(1)(b)". (App. 29a-30a). *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 370 (3d Cir. 1995). (App. 13a)

USHC has filed its Petition for Certiorari from the decision of the Court of Appeals for the Third Circuit.

REASONS FOR DENYING THE WRIT

The decision by the Third Circuit Court of Appeals in this matter was based upon the precise facts of these consolidated cases and represents a faithful application of this Court's decision in *Metropolitan Life* and *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). Furthermore, contrary to the Petitioner's claim, the decision by the Third Circuit Court of Appeals in this case does *not* conflict with decisions of other circuit courts. To the contrary, the Third Circuit's legal analysis of whether the district court properly excised removal jurisdiction is consistent with the decisions of other circuit courts which have specifically addressed the application of *Metropolitan Life* to similar factual situations: *Zuniga v. Blue Cross and Blue Shield of Michigan*, 52 F.3d 1395 (6th Cir. 1995); *Warner v. Ford Motor Co.*, 46 F.3d 531 (6th Cir. 1995); *Anderson Electronic Data Systems Corp.*, 11

F.3d 1311 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 55 (1994); *Lupo, supra*. In each case, the court applied the same legal analysis as the Third Circuit in determining whether plaintiff's state court action was properly removed on the basis of an ERISA pre-emption defense. Thus USHC's real disagreement with the Third Circuit's decision is its belief that the Third Circuit misapplied *Metropolitan Life* to the facts of this case. However, assuming *arguendo* that USHC is correct, which it is not, such can not be a basis for review by this Court. Rule 10.1 of the Rules of the Supreme Court of the United States. Finally, the Third Circuit's decision does *not* foreclose USHC from raising its ERISA pre-emption defense, but only leaves it to the state court to decide subject to ultimate review by this court. *Warner, supra* at 535.

THE THIRD CIRCUIT APPLIED THE ACCEPTED INTERPRETATION OF *METROPOLITAN LIFE* TO THE FACTS OF THESE CASES

In *Franchise Tax Bd.* this Court held that ERISA pre-emption without more does not convert a state law claim into an action arising under federal law. *Id.* 463 U.S. at 25-27, 77 L.Ed.2d 420, 103 S. Ct. 2841; *Alexander v. Electronic Data System, Corp.*, 13 F.3d 940, 944 (6th Cir. 1994). Then in *Metropolitan Life* this Court went on to hold that a state claim which was not only pre-empted by ERISA, but which *also* came within the scope of the civil enforcement provisions of ERISA, would be subject to removal to federal court: "Indeed as we have noted, even an 'obvious' pre-emption defense does not, in most cases, create removal jurisdiction. In this case, however, Congress has clearly manifested an intent to make causes of

action within the scope of the civil enforcement provisions of §502(a) removable to federal court." *Id.* at 66, 95 L.Ed.2d 55, 107 S. Ct. 1542. The Court found that Congress intended this result based in part upon the following language from the Congressional Conference Report on ERISA describing the civil enforcement provision of §502(a):

> "[W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in US district courts but also in State courts of competent jurisdiction. All such actions in Federal or State courts are to be regarded as arising under the laws of the United States. . . .

Id. at ___ 95 L.Ed.2d ___, 107 S. Ct. 154.

Applying *Metropolitan Life* to the instant matter, the Third Circuit correctly held that the Viscontis' negligence claims did *not* fall within the scope of the civil enforcement provisions of §502(a) of ERISA; and therefore, the district court lacked removal jurisdiction over the Viscontis' state law claims. This decision is a recognition of the distinction drawn by this Court in *Metropolitan Life* between suits asserting a §502(a) claim "to enforce benefit rights under the plan or to recover benefit rights under the plan" and those actions, such as involved in the instant matter, which seek to recover for deficiencies in medical care rendered to a plan participant. The Third Circuit correctly found that the Viscontis are *not* asserting any type of §502(a) claim since they are seeking compensatory damages for personal injuries arising *not* from the denial of plan benefits or the administration of an ERISA

plan, *but for deficiencies in the medical care provided by the defendant health care providers.* (App. 17a-30a). Since the Viscontis' claims do not fall within the scope of ERISA's civil enforcement provision, under *Metropolitan Life* the district court lacked removal jurisdiction over their state court action and the Third Circuit properly ordered remand.

THE THIRD CIRCUIT'S DECISION PROPERLY LEAVES THE ISSUE OF ERISA PRE-EMPTION TO BE DECIDED BY STATE COURT WHICH IS THE PROPER AND COMPETENT FORUM TO DECIDE THE ISSUE

USHC contends that this Court should grant review so as to consider whether only federal courts should decide the issue of whether ERISA pre-emption defense applies to state law damage claims (Petition at 16). However, it is settled law that the issue of federal pre-emption is not reserved exclusively for federal courts. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S. Ct. 2425, 96 L.Ed.2d 318 (1987). The Petitioner's request for review is premised on its own confusion as to the doctrine of jurisdiction and federal pre-emption. The decision that the Viscontis routine medical negligence claims are pre-empted by ERISA is properly within the purview of state courts, with that decision subject to ultimate review by this Court. *Warner, supra* at 535.

> Removal and pre-emption are two distinct concepts. "The facts that a defendant might ultimately prove that a plaintiff's claims are pre-empted" – for example under §1144(a) – "does not establish that they are removable to federal court." *Caterpillar*, 482 U.S. at 398, 107 S. Ct. at 2432. The

> federal pre-emption defense in such non-removable cases would be decided in state court and would be subject to review on certiorari in the U.S. Supreme Court. Removal jurisdiction based on original federal jurisdiction under §1441 is therefore not as broad as federal appellate jurisdiction which extends to federal defenses.

Id. The principles of federalism and respect for state sovereignty, as well as the right of the plaintiff to be master of his claim mandates that for their state common law actions the state court initially decide whether the plaintiff's claims are pre-empted by §514(a) of ERISA. There is a presumption that state courts are capable of faithfully applying federal law and will not subvert enforcement of ERISA. *Warner, supra* at 534. Furthermore, the defendant's suggestion that the district court's jurisdiction should be co-extensive with ERISA pre-emption (Petition at 12, 14) is contrary to this Court's established precedent in both *Metropolitan Life* and *Franchise Tax Bd.*, and can *not* afford the basis for review of the Third Circuit's decision in these consolidated cases.

THE THIRD CIRCUIT'S DECISION IS CONSISTENT WITH THE ACCEPTED LEGAL INTERPRETATION OF *METROPOLITAN LIFE* AND IS NOT IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUIT COURTS WHICH HAVE APPLIED THAT CASE TO SIMILAR CLAIMS

USHC's contentions that the Third Circuit's decision is in conflict with that of other circuit courts is erroneous. An examination of the decisions relied upon by the Petitioner reveals that each case is distinguishable on its facts from the instant matter and there is no true conflict

between this case and the decision of other circuit courts on this issue. For an example of true conflict see this Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, Nos. 93-1408, 93-1414, 93-1415, 1995 WL 238409 at *15 (April 26, 1995). All of the cases relied upon by the Petitioner to find a conflict with the Third Circuit's decision in these consolidated cases are readily distinguishable and do not represent a true conflict necessitating review by this Court:

(1) *Settles v. Golden Rule Insurance Co.*, 927 F.2d 505 (10th Cir. 1991). In the first place, this case did not involve the issue of removal because the plaintiffs had commenced the action in district court. However, more importantly, *Settles*, as the Tenth Circuit recognized, involved a claim arising from "a direct result of the termination of plan benefits. . . . " *Id.* at 509. In other words, a benefits determination under an ERISA governed employee benefits plan. Thus, it was a §502(a) claim for benefits due under a plan. Such a claim is identical to that involved in *Metropolitan Life* and *not* the type of claim asserted by the Viscontis.

(2) *Hubbard v. Blue Cross & Blue Shield Ass'n*, 42 F.3d 942 (5th Cir. 1995), *cert. denied, Blue Cross & Blue Shield Association v. Hubbard*, ___ U.S. ___, 115 S. Ct. 2276 (1995). USHC's reliance on *Hubbard* is completely misplaced. *Hubbard* involved two distinct claims arising from the denial by the plaintiff's insurer to provide coverage for certain requested cancer treatments. The first was a fraud claim based upon the insurer's alleged use of secret guidelines for the approval of medical treatment; the second involved a claim of fraudulent inducement by the insurer in portraying itself as an honest company which would honor its commitments to its policyholders and

not engage in deceptive trade practices. In finding that ERISA pre-empted the first claim, but not the second, the Fifth Circuit only touched upon whether there existed removal jurisdiction under *Metropolitan Life*, in a footnote. *Id.* at 945 n.5. Moreover, in deciding that the plaintiff's first claim was pre-empted, the Fifth Circuit premised it upon a finding that "the essence of Hubbard's [secret guidelines] claim is that her benefits under the plan were improperly denied." *Id.* at 946. Furthermore, implicit in the *Hubbard* Court finding that ERISA did not pre-empt plaintiff's second claim was that it did not seek recovery of benefits due under an employee welfare benefits plan. *Id.* at 947. The *Hubbard* decision is not in conflict with the Third Circuit's decision but represents the same type of analysis only applied to the actual determination of whether the plaintiff's claims were pre-empted by §514(a) of ERISA.

(3) *Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2456 (1993). Once again, although the plaintiff in *Rodriguez* asserted several state law claims, removal was proper because the "state law claims, at bottom, result from dissatisfaction over Pacificare's handling of his medical claims." *Id.* at 1017. The Fifth Circuit recognized this consideration concerning removal jurisdiction when it noted at the outset of the decision that "[t]hese claims stem from Pacificare's refusal to reimburse Rodriguez for medical expenses he incurred." *Id.* at 1016. Removal was proper in *Rodriguez*, just as in *Metropolitan Life*, not solely because ERISA pre-empted plaintiff's claims, but because the plaintiff was also asserting a claim within the scope of ERISA's civil enforcement provision, unlike in the instant

matter. Therefore, *Rodriguez* is consistent with and does not conflict with the Third Circuit's decision in this case.

(4) *Shiffler v. Equitable Life Assurance Society of U.S.*, 838 F.2d 78 (3d Cir. 1988). This Third Circuit decision does not conflict with the decision of the same court in the case *sub judice*. *Shiffler* involved a claim to recover death benefits under employee welfare benefit plans governed by ERISA. Removal of the plaintiff's state law action to federal court was supported not only on the basis that the plaintiff's action "was to recover benefits and enforce rights under the employee benefits plan, and thus, the suit was essentially an ERISA action within the district jurisdiction," but the Court also found that the district court had diversity jurisdiction over the parties. *Id.* at 82. Thus, in *Shiffler* removal was proper and there is no conflict with the Third Circuit decision in this case since Mrs. Shiffler was asserting a §502(a) claim. *Id.*

(5) *Stevens v. Employer-Teamsters Joint Council*, 979 F.2d 444 (6th Cir. 1992). As with other cases relied upon by U.S. Healthcare to find a conflict, *Stevens* did not even involve the issue of the propriety of removal to federal court of an action commenced in state court. The case was commenced in district court by the plaintiff to recover pension benefits asserting jurisdiction *inter alia*, under ERISA, but which the Sixth Circuit rejected. *Id.* at 449. Therefore, on this basis alone it is distinguishable from the Third Circuit's decision in the instant matter. Furthermore, the Sixth Circuit suggestion, but not holding, that district court jurisdiction should be co-extensive with ERISA pre-emption is flatly at odds with this Court's pronouncements in *both Franchise Tax Bd.* and *Metropolitan Life*.

(6) *Olson v. General Dynamics Corp.*, 960 F.2d 1418, (9th Cir. 1991), *cert. denied*, 504 U.S. 986 (1992). This case cannot create a conflict between the Third Circuit and Ninth Circuit because the *Olson* Court did not address in any manner whether removal was proper. This decision contained no discussion whether removal of the plaintiff's state court action was proper. It appears that both the district court and the Ninth Circuit only addressed the issue of whether plaintiff's state law claims were pre-empted by ERISA. Indeed, *Metropolitan Life* was only mentioned in passing by the Ninth Circuit and no discussion of its applicability to the fact of *Olson* was made by the Ninth Circuit. However, although the Ninth Circuit stated *Olson* was *not* asserting a §502(a) claim under ERISA, the essence of Mr. Olson's claim seemed to be that he was not receiving the benefits that were due him under his employer's ERISA plan. *Id.* at 1421. Therefore, *Olson* can not be read as to be in "conflict" with the Third Circuit decision in this case.

(7) *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992). This case is readily distinguishable on its facts from the instant matter, and therefore, cannot lend support to a claim of conflicting circuit court decision on the scope of removal jurisdiction under ERISA. *McCoy* involved the determination of whether the Massachusetts mechanics lien statute as enforced by an employee welfare benefits plan was pre-empted by ERISA. Although the underlying action was removed to federal court from Massachusetts state court, the First Circuit only considered the propriety of removal in a footnote *and* did not discuss how *Metropolitan Life* applied to the facts of that case. 950 F.2d at 15,

n.1. Given the absence of any discussion by the First Circuit of the propriety of removal and that the claim involved in *McCoy* bears no similarity to the claims asserted by the Viscontis, renders *McCoy* inapposite to the instant case. Given the clear distinction between the two cases, *McCoy* does not represent the kind of conflict between circuit courts which necessitated this Court's review.

(8) *Corcoran v. United Healthcare, Inc.*, (5th Cir. 1992), *cert. denied*, 113 S. Ct. 812 (1992). Although U.S. Healthcare places great reliance on *Corcoran* to base its claims of a conflict among the circuit courts over the interpretation of *Metropolitan Life*, the cases are easily reconciled. As the Third Circuit recognized (App. 27a-28a), *Corcoran* is readily distinguishable since it involved a claim that certain ERISA plan benefits were denied the plaintiff, which denial the plaintiff claimed caused the physical injury for which suit was brought. Given this factual scenario the plaintiff in *Corcoran* was clearly making a claim within the scope of §502(a); and therefore, *Corcoran* is entirely consistent with the Third Circuit's analysis of *Metropolitan Life*. The different results are *not* due to conflicting interpretations of the holding of *Metropolitan Life*, but in its application to the differing facts of the cases as the Third Circuit correctly perceived: "Stated another way, unlike *Corcoran*, there is no allegation here that the HMO's denied anyone any benefits that they were due under the plan. Instead the plaintiffs here are attempting to hold the HMO's liable for their role as the arrangers of their decedent's medical treatment." (App. 28a-29a). Thus, as correctly recognized by the Third Circuit decision, the different results in the two cases stems from the

difference in the facts of the two cases. Accordingly, there is no conflict between the Third Circuit's decision and the *Corcoran* decision which requires review by this Court.

Finally, as conceded by USHC (Petition at 11), the Third Circuit's decision is consistent with the legal analysis utilized by the Courts of Appeal of the Second, Fifth and Sixth Circuits in connection with cases similar to the instant matter. *Warner, supra* at 535; *Anderson, supra* at 1314; *Lupo, supra* at 272. A review of these cases makes clear that USHC's disagreement with the Third Circuit's decision does not stem from any conflict with the Court's interpretation of *Metropolitan Life,* but from the application of it to the facts of this case. However, such is not sufficient to require review by this Court.

CONCLUSION

The Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit should be denied for the following reasons: (1) The decision of the Third Circuit is a faithful interpretation and application of this Court's decision in *Metropolitan Life* governing the proper scope of removal jurisdiction based upon a claim of ERISA pre-emption; (2) The Third Circuit's decision is consistent with the interpretation and application of *Metropolitan Life* by the Courts of Appeals of the Second, Fifth and Sixth Circuits; (3) There is no true conflict between the Third Circuit's decision and that of other Circuit Courts that have addressed the issue of removal jurisdiction based upon ERISA pre-emption defense; (4) The well established precedent of this Court is that an ERISA

pre-emption defense will not itself create federal question jurisdiction under 28 U.S.C. §1441(b) allowing removal of a state court action; and (5) The Third Circuit's decision does not foreclose the defense of ERISA pre-emption but only properly leaves the decision of that issue to state court subject to ultimate review by this Court.

Respectfully submitted,

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